Supreme Court, U.S.
FILED

93 1915 MAY 31 1994

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1993

FLOYD THOMAS ALTIMUS
and
JANICE M. CHURCH,

Petitioners,

v.

STATE OF OREGON,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State of Oregon

PETITION FOR A WRIT OF CERTIORARI

CHARLES F. HUDSON*
ROBERT E. MALONEY, JR.
LANE POWELL SPEARS LUBERSKY
Suite 800
520 S.W. Yamhill Street
Portland, Oregon 97204
(503) 226-6151

GEORGE W. MEAD, JR.
1480 Pacific First Federal Building
851 S.W. Sixth Avenue
Portland, Oregon 97204
(503) 228-7686

*Counsel of Record

Counsel for Petitioners

May, 1994

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The State of Oregon brought an action to condemn two acres of petitioners' land for the widening of a state highway. Over objection, the state presented evidence that petitioners would have been required by local ordinance to dedicate approximately half of the property condemned in order to obtain a zone change. This evidence was based on a series of prior exactions which had required other property owners to deed land to the state for the highway widening. In each case the amount of land dedicated was determined by the needs of the state project without specific analysis of any needs created by the property. Relying on the Oregon Supreme Court's decisions in *Dolan v. City of Tigard*, 317 Or 110, 854 P2d 437, *cert granted*, ___ US ___, 114 S Ct 544 (1993) and *Dept. of Trans. v. Lundberg*, 312 Or 568, 825 P2d 641, *cert denied*, ___ US ___, 113 S Ct 467 (1992), the Oregon Court of Appeals affirmed.

The question presented, which arises with increasing frequency, is whether the admission of such evidence violated petitioners' constitutional rights to just compensation, due process, and equal protection under the Fifth and Fourteenth Amendments to the United States Constitution.

PARTIES TO THE PROCEEDING

The caption contains the names of all the parties to this proceeding. Russell Olson, who was named in the original complaint and in all subsequent captions below, failed to appear in the action. A judgment of default was entered against him in the trial court. Appendix F (App 19-20).

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 9

I. THIS COURT SHOULD ADDRESS THE RELATIONSHIP BETWEEN DEVELOPMENT EXACTIONS AND PROCEEDINGS IN EMINENT DOMAIN 9

II. THE DECISION BELOW IS ERRONEOUS AND CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER STATE AND FEDERAL COURTS 11

A. Because The Dedications At Issue Were Determined By The State's Project, And Not By Needs Created By The Property, They Lacked The Nexus Required By *Nollan* 11

B. The Dedication Requirement Alleged Violated The Takings Clause And The Equal Protection Clause By Forcing Petitioners To Bear Public Burdens Which, In Fairness And Justice, Should Be Borne By The Public As A Whole 14

C. The Dedications Resulted From The State's Project And Were Therefore Inadmissible Under *Virginia Electric* and Other Case Law 16

TABLE OF CONTENTS – Continued

Page

III. THE QUESTION PRESENTED IS IMPORTANT .. 18

CONCLUSION 19

APPENDIX A .....App. 1

APPENDIX B.....App. 13

APPENDIX C.....App. 14

APPENDIX D .....App. 15

APPENDIX E.....App. 17

APPENDIX F.....App. 19

APPENDIX G.....App. 22

APPENDIX H .....App. 26

APPENDIX I .....App. 32

TABLE OF AUTHORITIES

Page

Cases

Armstrong v. United States, 364 US 40 (1960)..... 15

Board of Com'rs of State Inst. v. Tallahassee B&T Co., 108 So 2d 74 (Fla App 1958), *pet quashed* 116 So 2d 762 (Fla 1959)..... 16

Dept. of Trans. v. Lundberg, 100 Or App 601, 788 P2d 456 (1990), 312 Or 568, 825 P2d 641, *cert denied*, ___ US ___, 113 S Ct 467 (1992).....8, 10

Dept. of Trans. v. Lundberg, 312 Or 568, 825 P2d 641, *cert denied*, ___ US ___, 113 S Ct 467 (1992) 7, 8, 9, 10, 17

Dolan v. City of Tigard, 317 Or 110, 854 P2d 437, *cert granted*, ___ US ___, 114 S Ct 544 (1993) 3, 7, 9, 15, 18-19

Longridge Builders, Inc. v. Planning Board of Princeton Township, 52 NJ 348, 245 A2d 336 (1968) 13

Nollan v. California Coastal Comm'n, 483 US 825 (1987) ..... *passim*

Parks v. Watson, 716 F2d 646 (9th Cir 1983) 13

Robertson v. City of Salem, 191 F Supp 604 (D Or 1961)..... 16

United States v. Certain Lands In Truro, Etc., 476 F Supp 1031 (D Mass 1979) 16

United States v. Meadow Brook Club, 259 F2d 41 (2d Cir 1958), *cert denied*, 358 US 921 (1958)..... 10

United States v. Miller, 317 US 369 (1943).....3, 10

United States v. Virginia Electric & Power Co., 365 US 624 (1961) 3, 7, 8, 10, 16

TABLE OF AUTHORITIES – Continued

Page

UNITED STATES CONSTITUTION

Fifth Amendment 2

Fourteenth Amendment 2

STATUTORY PROVISIONS

28 U.S.C. § 1257(a) 2

McMinnville City Ordinance 4248 2

McMinnville City Ordinance 4306 ..... 2, 17

McMinnville City Ordinance 4357 .... 2, 6, 7, 11, 12, 13

McMinnville City Ordinance 4434 2

No. _____

In The

Supreme Court of the United States

October Term, 1993

FLOYD THOMAS ALTIMUS
and
JANICE M. CHURCH,

Petitioners,

v.

STATE OF OREGON,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State of Oregon

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Oregon Court of Appeals is reported at 124 Or App 61, 862 P2d 109 (1993), and is reproduced as Appendix A (App 1-12). No opinions were issued by the trial court, which entered judgment on a jury verdict (App 19-25).

JURISDICTION

The decision of the Oregon Court of Appeals, review of which is sought on petition, was entered on October

20, 1993 (App 1). That court considered a timely petition for review and denied reconsideration on February 2, 1994 (App 13). The petition for review was denied by the Oregon Supreme Court on March 1, 1994 (App 14). This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The federal constitutional provisions at issue are the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment provides in part: "[N]or shall private property be taken for public use without just compensation." The Fourteenth Amendment provides in part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The statutory provisions at issue include three ordinances (Nos. 4248, 4306 and 4434) enacted by the City of McMinnville prior to the condemnation of petitioners' land. Each of the ordinances, which affected three separate properties nearby, provided for a zone change conditioned upon the applicant's dedication of property to the same state highway project for which petitioners' property was condemned. A fourth ordinance (No. 4357), articulated the zoning policy on which these exactions were purportedly based. The pertinent text of each ordinance is reproduced in Appendix H (App 26-31).

STATEMENT OF THE CASE

This is a condemnation action in which the respondent State of Oregon took approximately two acres of petitioners' land to widen a highway. At trial the state was permitted to present evidence that, in order to secure a zone change, petitioners would have been required to dedicate much of the property condemned. Petitioners objected to this evidence, which was based on a series of prior project-related local exactions, as an infringement of their federal constitutional rights to just compensation, due process and equal protection.

Relying on the Oregon Supreme Court's recent decision in *Dolan v. City of Tigard*, 317 Or 110, 854 P2d 437, *cert granted*, ___ US ___, 114 S Ct 544 (1993), the Oregon Court of Appeals rejected arguments that such evidence should have been excluded because the prior exactions were determined by the needs of the project and, under *Nollan v. California Coastal Comm'n*, 483 US 825 (1987), lacked a constitutionally sufficient nexus to any need created by the anticipated development of petitioners' property. Petitioners also argued that evidence based on such exactions violated the rule, established by this Court in *United States v. Miller*, 317 US 369, 376-77 (1943) and *United States v. Virginia Electric & Power Co.*, 365 US 624, 636 (1961), that project-related impacts must be excluded in determining market value.

Petitioners attempted to raise the same issues in the Oregon Supreme Court, which denied review (App 14). Pertinent portions of the trial transcript, and of petitioners' assignments of error on appeal, are reproduced in Appendix I (App 32), and summarized below.

Janice Church and her brother Floyd Altimus are owners of a parcel of farmland located just outside McMinnville, Oregon. At the time of this action, the property consisted of 13 acres of undeveloped land with 670 feet of frontage on State Highway 18. Known locally as Three Mile Lane, this portion of the highway was a "coach road" serving local properties until the early 1960's, when it was connected to the state highway at each end and converted to a bypass carrying traffic between Portland and the Oregon coast (I Tr 102). In May 1989, the state filed an action in the Circuit Court for Yamhill County, Oregon, condemning approximately two acres of petitioners' property to widen this bypass and construct a parallel frontage road.

Although county zoning of the land was agricultural, petitioners' property was within McMinnville's urban growth boundary, and would be within the city's designated industrial zone; the properties on either side had already been annexed to the city. At trial, it was not disputed that the highest and best use of petitioners' property was industrial, or that such zoning would have been allowed upon their request for annexation to the city (I Tr 81; II Tr 193, 238-39; III Tr 364; IV Tr 17-18). While there was no existing ordinance which required petitioners to dedicate any of their property in exchange for a zone change (I Tr 87-88), such requirements had been imposed on other applicants along the bypass. Based on this history, the state's counsel proposed to use a diagram (Ex 1) depicting the hypothetical dedication of about an acre of petitioners' property (I Tr 1-2; App 32).

Over petitioners' objections, the state's counsel was permitted to use the diagram in opening statement (I Tr 2;

App 32), and advised the jury that testimony from the city planner would support the dedication it depicted. Describing the prior exactions, counsel told the jury that if petitioners wanted a zone change or building permit they would have been required to dedicate a strip of land 70 feet in width, and that the land subject to this dedication had "zero value" for industrial use (I Tr 44). Before the state presented its case, petitioners renewed their objection and moved to exclude evidence of this hypothetical dedication requirement (App 32-33). The motion was denied, and, using the diagram, the state's expert valued petitioners' property based on a 70 foot dedication. The diagram was later admitted into evidence over petitioners' objection (IV Tr 115). The trial court also refused petitioners' request for a jury instruction that the evidence be disregarded (App 34).

The state's evidence, including the opinion of its expert (IV Tr 54-55), rested on the testimony of the city planner and on the series of prior site-specific ordinances which had required other property owners seeking zone changes to deed to the state whatever width of property was needed for its project (I Tr 87-90). In each case, city officials would call the Oregon Department of Transportation ("ODOT") to determine the required width (typically between 40 and 60 feet) and incorporate it in the ordinance (I Tr 88-96; Ex 107-109; App 32). In one instance, the ordinance simply stated:

> "That a 60 foot wide, more or less, strip of land adjacent to Highway 18 be deeded to the state for right-of-way prior to final occupancy of the site. The exact width of said strip of land will be determined by the Oregon Department

> of Transportation and shall correspond with that right-of-way actually needed for the improvement of Highway 18." (Ex 109; App 28-29).

The city planner's testimony suggested that petitioners could have been required to dedicate a 60 to 70 foot width (I Tr 97, 98). However, when asked what dedication the city might have required in the absence of the state highway project, the planner suggested possible widths from 15 to 45 feet, depending on whether the development required internal circulation, and *not* the 70 foot width that the state was allowed to present to the jury (I Tr 125-130, 131-32).

This pattern of *city* ordinances, each requiring the transfer of private property, by deed, *to the state*, for the anticipated widening of Highway 18, began at least as early as 1983 (Ex 107; App 26). By March 7, 1985, ODOT had published the Final Environmental Impact Statement for its selected design (IV Tr 89-90, 113-114). McMinnville Ordinance 4357, reflecting the "policy" on which these dedications were ostensibly based, provides in general terms that an "adequate" level of urban services should be available for properties annexed to the city, including roads "with an adequate design capacity *for the proposed use and projected future uses.*" (Ex 106; App 30; emphasis added). This "policy" requires the city to consider its ability to pay for the public costs involved, and to note potential requirements for dedication or other participation in such costs by the property owner. *Id.*

The evidence established that the ability of the city to provide for road costs was not a concern with respect to the widening of Highway 18, as state or federal funding was already committed for the full cost of the highway

project, and none of the funding for the project came from the city (I Tr 82, 148). In contrast, the financial interest of the state was significant, since any property which could not be acquired by dedication would need to be condemned. Testimony from a senior ODOT right-of-way agent indicated potential savings of $100,000 in acquisition costs based upon the forced dedications associated with three other properties on the Highway 18 bypass (I Tr 152-153).

The jury returned a verdict for $7,000 and petitioners appealed.

The Oregon Court of Appeals considered this record in light of the Oregon Supreme Court's decision in *Dolan* and affirmed. Focusing on the general policy described in McMinnville Ordinance No. 4357, the court rejected petitioners' arguments based on this Court's decision in *Nollan*, and held that "the requisite nexus exists between the increased need for proper traffic circulation created by proposed industrial development and the dedication of a portion of defendant's land to a highway widening project that would obviate the need for the city to build a frontage road" (App 10).

The court of appeals also relied on the Oregon Supreme Court's earlier decision in *Dept. of Trans. v. Lundberg*, 312 Or 568, 825 P2d 641, *cert denied*, ___ US ___, 113 S Ct 467 (1992), which had interpreted this Court's decisions in *Nollan* and in *Virginia Electric*. In *Lundberg*, the state had condemned a 10-foot strip in order to construct a sidewalk, relying on a city-wide local ordinance which conditioned a variety of land-use approvals on

applicants' dedication of up to a 10-foot width for sidewalk construction. Like petitioners, the *Lundberg* property owners had not applied for such approvals, but development of their property to its highest and best use arguably would have required them.

Upholding admission of the ordinance in *Lundberg*, the court of appeals had rejected the property owners' "abstract reliance on *Nollan*" because it was impossible to know the impact of development which had not yet been "undertaken or proposed." 788 P2d at 458. The Oregon Supreme Court affirmed on different grounds, holding that an "essential nexus" existed "between development of property abutting public streets and sidewalk dedication." 825 P2d at 646-47. Each court had also rejected the property owners' contentions that the sidewalk ordinance had been adopted by the city in order to depress property values before the state's condemnation, and should have been excluded under the rule enunciated in *Virginia Electric*. The court of appeals held that the rule could not apply when a *city* ordinance reduces the value of property condemned by the *state*. 788 P2d at 458-59. Assuming without deciding that the rule of *Virginia Electric* might apply when one governmental body acts in order to reduce the value of property condemned by another, the Oregon Supreme Court held that the property owners had failed to show that the city-wide ordinance was enacted for the purpose of assisting the state. 825 P2d at 648.

Analyzing the current petitioners' arguments under *Virginia Electric* and related cases, the court of appeals concluded that, "as in Lundberg," petitioners had

"offered nothing more than the existence of the [challenged] ordinance and the existence of the state's project to support claims that the purpose of the ordinance was to depress property values in contemplation of the state's condemnation proceedings" (quoting *Lundberg, supra,* 825 P2d at 648) (App 9).

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD ADDRESS THE RELATIONSHIP BETWEEN DEVELOPMENT EXACTIONS AND PROCEEDINGS IN EMINENT DOMAIN.

This petition, which follows arguments in *Dolan* earlier this Term, provides a rare and timely opportunity to address the evidentiary use of development exactions in state initiated actions to condemn private property.

When, as in *Dolan,* a property owner is confronted with a requirement to dedicate land, the issue is squarely presented and the procedure for challenge established. The same constitutional concerns are presented whenever the government argues that the defendant in a condemnation action would be required to dedicate a portion of his property in order to obtain its highest and best use. Certainly there is at least the same "heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective." *Nollan, supra,* 483 US at 841. In the second context, however, the property owner's ability to challenge the hypothetical exaction is frequently more circumscribed.

Because the development of the property being condemned has not occurred or been precisely defined, the relevant policy or standard may be more difficult to apply. Indeed some courts may conclude, as did the Oregon Court of Appeals in *Lundberg, supra,* 788 P2d at 458, that the property owner has *no* legal challenge in this context. The dedication evidence is likely to be one of many issues presented at trial. Matters are further complicated when, as is frequently the case, the condemnor relies on land use requirements which would arguably be imposed by another governmental entity. *See, e.g., Lundberg, supra,* 788 P2d at 458-59.

Apart from the broad rule, established in *Miller* and *Virginia Electric,* that the impact of the project itself on market value is to be excluded, this Court has not directly addressed such evidentiary issues. In the abstract, the lower courts have recognized the principle that manipulation of the police power to avoid just compensation is wrong; however, where different governmental entities are involved, the property owner may be put in the position of proving collusion or improper motive – as the decision below demonstrates (App 7-9). *See also Lundberg, supra,* 825 P2d at 647-48; *United States v. Meadow Brook Club,* 259 F2d 41, 45 (2d Cir 1958), *cert denied,* 358 US 921 (1958). What constitutes "collusion," as opposed to legitimate intergovernmental "coordination," has not been clearly defined.

Because it presents the issues so starkly, the record in this case provides an important opportunity to define constitutional limitations on the evidentiary use of exactions. By their terms, each of the local ordinances required the transfer of private property, by deed, to the

state, for a specific state project. The project was funded entirely from nonlocal sources, and, absent dedication, the state would have been required to pay for the property taken. In each case, the scope of the dedication was explicitly determined by the needs of the state project, and not according to any analysis of particular needs created by the property involved. Finally, the record permits the Court to compare the scope of these project-related exactions with undisputed evidence that any locally determined dedication would have been substantially less.

II. THE DECISION BELOW IS ERRONEOUS AND CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER STATE AND FEDERAL COURTS.

A. Because The Dedications At Issue Were Determined By The State's Project, And Not By Needs Created By The Property, They Lacked The Nexus Required By *Nollan*.

The dedications relied upon were based upon the needs of the state's highway project rather than on any land use regulation determined by local property development, consequently, they lacked the essential nexus described by this Court in *Nollan*. For the same reason, the court of appeals' decision conflicts with most other state and federal courts which have addressed the issue.

Largely ignoring petitioners' contentions concerning these prior dedication ordinances, the court of appeals focused instead on the city's general policy statement in Ordinance 4357, which provided that an adequate level of urban services be available within three years for annexed properties, including:

> "(2) Roads with an adequate design capacity for *the proposed use and projected future uses.* Where construction of the road is not deemed necessary within the three-year time period, the City shall note requirements *such as dedication* of right-of-way, waiver of remonstrance against assessment for road improvement costs, or participation in other traffic improvement costs, for application at the appropriate level of the planning process. The City shall also consider public costs for improvement and the *ability of the City to provide for those costs.*" Ordinance 4357 (emphasis added) (App 30)

To the extent that it establishes a general policy, Ordinance 4357 illustrates petitioners' point: the city's Highway 18 ordinances were unconstitutional because they required dedications which were *not* based upon the "proposed [or] projected future uses" of the properties involved, but on the needs of the state's project. The only testimony concerning what the city might have done in the absence of ODOT's widening of Highway 18 suggested widths of 15 to 45 feet depending on whether internal circulation would be required for the property to be developed (I Tr 125-126, 132). Based on conversations with the city planner, the state's own expert concluded internal circulation might not have been required for petitioners' property (IV Tr 54-55). In that case, the dedication requirement alleged by the state was more than four times any that might have been applied in the absence of the highway project.

Moreover, the local fiscal purpose inherent in Ordinance 4357 was not served by any of the site-specific dedication ordinances along Highway 18 which, by their

terms, simply required local property owners to contribute their land to a state project. According to the state's estimate, ODOT achieved a savings of approximately $100,000 (I Tr 152-153). Because the state highway improvements were funded from state and federal revenues, there was no financial benefit to the city (I Tr 82, 148), and no reason that Ordinance 4357 should have had *any* application along Highway 18.

Inherent in the court of appeals' interpretation of *Nollan* is the assumption that a locality may exercise its police powers to assist another governmental entity in its exercise of the power of eminent domain – so long as the locality shares some interest in the project. According to this analysis, once *some* overlapping local purpose exists, a nexus is established, and it becomes unnecessary to further scrutinize the extent of the exaction, or the nature of its relationship to local development.

This position, however, is inconsistent with *Nollan*, and with the approach taken by most of the state and federal courts which have considered the issue. While specific formulations vary, most courts have concluded that development exactions must have some reasonable relationship to the needs created by the property. *See, e.g., Longridge Builders, Inc. v. Planning Board of Princeton Township*, 52 NJ 348, 350, 245 A2d 336, 337 (1968). *See also Parks v. Watson*, 716 F2d 646, 653 (9th Cir 1983). *Cf. Nollan, supra*, 483 US at 439-40.

In the case now before the court, there is no evidence to relate the 70 foot dedication alleged by the state to any development of petitioners' property, or indeed to local development generally. The 70 foot dedication alleged by

the state meets a reasonable relationship test *only* if it is permissible to enlarge the dedication beyond its purported local purpose to include the additional footage required by a state highway bypass designed to improve travel to and from the Oregon coast. But nothing in *Nollan* suggests that such piggybacking of state requirements is permissible. It cannot, since there is *no* rational relationship, *or* "essential nexus," between this additional burden and the local citizen's development of his property.

B. The Dedication Requirement Alleged Violated The Takings Clause And The Equal Protection Clause By Forcing Petitioners To Bear Public Burdens Which, In Fairness And Justice, Should Be Borne By The Public As A Whole.

As petitioners also argued below, the dedication requirement alleged violated their constitutional rights by impermissibly shifting to them public burdens which should have been shared among all state taxpayers.

In *Nollan*, this Court emphasized the necessity that there be an essential nexus between a public burden created by the property owner and any condition to be imposed by a local regulatory authority. Because the ordinance in *Nollan* failed to meet even this "untailored standard," the Court was able to strike it down without further analysis. 483 US at 838. However, as the Court specifically noted, such regulatory conditions may also violate the Constitution if they impose a disproportionate burden on the property owner.

> "If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause. One of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' But that is not the basis of the Nollans' challenge here." 483 US at 835, n 4 (citations omitted).

See also Armstrong v. United States, 364 US 40, 49 (1960).

This principle, which the court of appeals did not address, is inherent in petitioners' other constitutional arguments. It is also worth stating separately, because it helps explain what is wrong with a rule which permits local governments to require citizens to dedicate property to state projects without compensation – and why a sufficient nexus between such dedications and burdens created by local development is not established simply because, in some sense, the state's objectives may be shared by the locality.

While many state projects are also desirable from a local standpoint, presumably they are selected and funded by the state because they serve objectives which are broader in scope. It is particularly inequitable, then, to place the burden of such undertakings on "the shoulders of those whose private property happens to be in the neighborhood of the proposed projects." *See, Dolan, supra*, 854 P2d at 448 (Peterson, J., dissenting).

The dedications at issue here resulted from the use of Three Mile Lane as a state highway bypass. The city contributed none of its tax revenues toward the improvement of this highway and would not have required comparable dedications in the absence of the state project. These were state burdens and should have been shared among all state taxpayers.

C. The Dedications Resulted From The State's Project And Were Therefore Inadmissible Under *Virginia Electric* And Other Case Law.

The prior dedications at issue also violated petitioners' constitutional rights under the Takings Clause based on the rule in *Virginia Electric* and on the related line of lower court decisions proscribing use of the police power to avoid the payment of just compensation. *See, e.g., Robertson v. City of Salem,* 191 F Supp 604 (D Or 1961) (while Salem's status as the "hostess city" to state government gave it an interest in preserving the Capitol area for state development, it could not justify zoning to minimize acquisition costs in anticipated eminent domain proceedings). *Cf. United States v. Certain Lands In Truro, Etc.,* 476 F Supp 1031 (D Mass 1979) (where the federal government suggested and encouraged restrictive local zoning prior to its condemnation of land for national seashore, such regulations could not be considered in determining just compensation), and *Board of Com'rs of State Inst. v. Tallahassee B&T Co.,* 108 So 2d 74 (Fla App 1958), *pet quashed* 116 So 2d 762 (Fla 1959) (it was appropriate to ignore restrictive local zoning limitations where state and city officials had agreed on restrictions in order to reduce the cost of acquisition for the state).

Here, the relationship between the local dedication ordinances and the state's project is obvious from their text. For example, McMinnville Ordinance No. 4306, enacted on November 6, 1984, provides:

> "That a 60-foot wide strip of land adjacent to Highway 18 be dedicated *to the state for right-of-way* prior to the development plan approval. The 60 feet of right-of-way will provide a total right-of-way of 120 feet which, *according to the State Department of Transportation, should provide enough land area for the widening of Highway 18.*" (Ex 108; App 27-28) (emphasis added)

However, relying on the Oregon Supreme Court's decision in *Lundberg, supra,* 825 P2d at 647-48, the court of appeals held that petitioners had failed to show that "the *purpose* of the ordinance was to depress property values in contemplation of the state's condemnation proceedings" (App 9; emphasis added). The court noted that the city had had an interest in expanding the bypass as early as the 1960's. (The city planner's testimony indicated that this interest began when the bypass was first created as part of the state system by routing highway traffic onto what was previously an "old coach road that served the land"; apparently, the resulting conflict with local property access, "even at that time was a problem" (I Tr 102).)

The decision below demonstrates the need for review, as it places constitutional rights at the mercy of a characterization of motive or "purpose" which is essentially circular. In the absence of any objective standard, one court may find improper collusion where another sees only intergovernmental cooperation. The result in

this case was that the city was permitted to sacrifice the property of individual citizens in an effort to mitigate problems associated with a state highway – problems for which it was not required to raise or spend its own revenue.

III. THE QUESTION PRESENTED IS IMPORTANT.

The city ordinances in the present case included a typical policy statement concerning intergovernmental "coordination" with "affected public and private agencies" including "various state agencies" (App 30).

As land use regulation becomes more pervasive, and coordination between government agencies increases, the issues presented in this case are becoming commonplace. They go to the core of the Constitution's protection of private property rights, and unless a clear limitation is enforced, judicial deference to governmental decisions will come at the expense of the constitutional rights of individuals like Mrs. Church and Mr. Altimus. In his dissenting opinion in *Dolan*, Justice Peterson commented on this tension between the necessary tendency toward increasing regulation of private property and a second related tendency to improperly shift public burdens to individuals. His description applies with equal force in this case.

> "The first of these tendencies seems benign and, even if it were otherwise, it would be inevitable. Some private property rights are going to have to bend, if our increasingly interdependent society is to continue to evolve and progress peacefully. The second tendency is an attempt at

licensed extortion. *The trouble is, what once would have been recognizable as extortion may turn, in time, into something considered benign because it is so familiar. That transmogrification is encouraged every time a court cannot distinguish whether a particular governmental regulation falls within the ambit of the second tendency, rather than the first.* 854 P2d at 448 (emphasis added)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES F. HUDSON*
ROBERT E. MALONEY, JR.
LANE POWELL SPEARS LUBERSKY
Suite 800
520 S.W. Yamhill Street
Portland, Oregon 97204
(503) 226-6151

GEORGE W. MEAD, JR.
1480 Pacific First Federal Building
851 S.W. Sixth Avenue
Portland, Oregon 97204
(503) 228-7686

*Counsel of Record

Counsel for Petitioners

APPENDIX A

October 20, 1993

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
by and through its
DEPARTMENT OF TRANSPORTATION,
Respondent,

v.

Floyd Thomas ALTIMUS
and Janice M. Church,
Appellants,

and

Russell OLSON,
Defendant.

(CV 89-137; CA A66578)

Appeal from Circuit Court, Yamhill County.

Wayne R. Harris, Judge.

Argued and submitted July 15, 1992.

Charles F. Hudson argued the cause for appellant. With him on the briefs were Robert E. Maloney, Jr., and Lane Powell Spears Lubersky.

Jas. Adams, Assistant Attorney General, argued the cause for respondent. With him on the brief were Charles S. Crookham, Attorney General, and Virginia L. Linder, Solicitor General.

Before Richardson,* Chief Judge, and De Muniz and Lesson,** Judges.

De MUNIZ, J.

Affirmed.

De MUNIZ, J.

In this condemnation action, defendants Altimus and Church (defendants) appeal from a jury verdict that awarded them $7,000 as "just compensation" for the state's taking of their land. The primary issue is whether the trial court erred in admitting evidence that a portion of the property could be subjected to a forced dedication policy if defendants sought annexation to a nearby city. We affirm.

Defendants owned a 13-acre parcel of undeveloped farmland near the City of McMinnville. The property, located in the county's "exclusive farm use-40" zone, is bordered on one side by State Highway 18. Plaintiff condemned approximately two acres of defendants' land for the purpose of widening the highway and constructing a parallel frontage road. The only issue at trial was the fair market value of the two acres.

Defendants presented evidence that the property is within McMinnville's urban growth boundary and would be within the city's designated "light industrial" zone if they applied for both annexation and a zone change to bring it into compliance with McMinnville's comprehensive plan. Expert witnesses for both sides agreed that the

---

*Richardson, C. J., *vice* Buttler, J., retired.

**Leeson, J., *vice* Rossman, J.

highest and best use of the property is limited light industrial. Defendants' witnesses testified that, if rezoned for that type of industrial use, the two-acre parcel would be worth between $65,000 and $86,000. A witness for plaintiff testified that McMinnville had a policy that allowed, but did not require, the city to force property owners to dedicate a portion of their land to road improvement projects upon annexation, in return for granting the zoning change. Another witness, Hughes, testified that the property at issue was worth $5,300. Hughes based that figure on his opinion that one of the two acres had only agricultural value, because he assumed that McMinnville would condition any zone change on defendants' dedication of one acre for the highway project.

Defendants' first assignment of error is directed at the trial court's decision to admit Hughes' testimony that defendants could be required to deed to plaintiff a portion of the property being taken in order to secure a zone change upon annexation to McMinnville. At trial, defendants moved to exclude that category of evidence on the ground that

> "to allow such evidence and to allow this theory of [plaintiff's] would be violating [*sic*] our Federal and State of Oregon constitutional right to just compensation for property that is taken, because it would deprive [defendants] of just compensation for that property."

They contend that an unconstitutional dedication policy would be unenforceable and, therefore, irrelevant to a determination of the property's fair market value and inadmissible as evidence at trial. Defendants also argue

that, although "theoretically" McMinnville could require them to dedicate a portion of their frontage to plaintiff for the state highway project, evidence of that possibility was speculative, because no existing ordinance required them to dedicate any of their property in exchange for a zone change.

Similar questions were raised in *Dept. of Trans. v. Lundberg*, 312 Or 568, 825 P2d 641, *cert den* ___ US ___, 113 S Ct 467 (1992). In *Lundberg*, the state condemned a 10-foot strip along each of the defendants' properties for the purpose of building a sidewalk. A City of Portland ordinance required that applicants, as a condition of obtaining a building permit, conditional use permit, zone change, land partition or variance, dedicate a portion of their property for the construction of a sidewalk, where needed. Neither of the defendants had applied for a building permit or taken any action that would have made the ordinance applicable to them. At a trial to determine the appropriate price for the state's acquisition, the defendants challenged the admissibility of evidence of the city's ordinance on the grounds that, *inter alia*, it was irrelevant, and its application violated the takings cause of the United States Constitution.[1] On appeal, the Oregon Supreme Court held that evidence of the ordinance was relevant, because the parties' experts had established that the highest and best use of the defendants' properties was commercial, but the properties had not been developed for commercial use and the

---

[1] The Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation."

defendants would not be able to develop them without first satisfying the sidewalk dedication requirement. Accordingly, the ordinance was "a matter that tend[ed] to affect the fair market value of the condemned property for its highest and best use." 312 Or at 575. The court also held that the ordinance was constitutional under the standards articulated in *Nollan v. California Coastal Comm'n*, 483 US 825, 107 S Ct 3141, 97 L Ed 2d 677 (1987), because it

> "reasonably relates to commercial development by providing pedestrian access and mitigates the negative impact of any proposed commercial use by buffering both the pedestrian and the commercial use from the vehicle use. The city's means for achieving these objectives is to require the owner to dedicate property for a sidewalk when the owner seeks to develop the property. The ordinance substantially furthers those purposes. An essential nexus exists between development of property abutting public streets and sidewalk dedication. The sidewalk dedication requirement * * * serves the same legitimate governmental purposes that would justify denying defendants permits to develop their commercially-zoned properties. Although the sidewalk dedication requirement results in an appropriation of land for a public use, under *Nollan* that requirement would not be considered a taking if it were attached to a permit to develop property. *See Nollan v. California Coastal Comm'n, supra*, 483 US at 836. [The Portland ordinance] is, therefore, a valid regulation of the use to which defendants' properties can be put." 312 Or at 577-78. (Citation omitted.)

After concluding that, on application for a land use approval, the sidewalk dedication requirement was not unconstitutional and evidence of its existence was relevant to determining the value of the affected property, the court summarily addressed the question of whether *evidentiary* use of the ordinance against the defendants constituted an unconstitutional "taking," because they had not yet applied for any land use approvals. It held that

> "[e]videntiary use * * * of a valid regulation of a condemnee's land use that is a relevant factor in determining just compensation does not constitute an unconstitutional taking." 312 Or at 578.

In this case, the evidence established that the highest and best use of defendants' property was light industrial. To secure a change from agricultural to industrial zoning, defendants acknowledged that first they would need to seek annexation by McMinnville. At that time, they would be subject to the city's policy of forced dedication.[2] Accordingly, evidence of the existence of the policy was relevant. The fact that the city might choose not to require dedication by defendants affects only the weight of plaintiff's evidence, not its relevancy. Having sought to convince the jury that the value of their land would be greater *if* they were annexed by the city and *if* they

---

[2] We note that, although much of defendants' brief is dedicated to attacking the city's dedication policy, they neither quote the objectionable language of the policy nor indicate the portion of the record that contains a copy of the policy. Having searched the record, it appears that the challenged policy was received into evidence as Defendant's Exhibit 106.

secured the desired zone change, defendants cannot complain that evidence of the city's dedication policy, which could be applied to defendants' property upon annexation, was "too speculative." The trial court did not err in declining to exclude evidence of the dedication policy. Neither did it err in allowing expert testimony as to the policy's effect on the fair market value of the property.[3] *Dept. of Trans. v. Lundberg, supra.*

Having determined that the policy was relevant to a determination of just compensation, we turn to the question of its constitutionality. Defendants argue that the policy works a taking because, under it, the past practice of the City of McMinnville has been to allow the state to determine its land needs for the highway project and then to require the land owner to dedicate that precise amount of land directly to the state. Defendants contend that a direct relationship exists between the state highway project and previous dedications that have been required by the city, in that all were determined by the state, based on its need for land to widen Highway 18, and, according to defendants, all of the dedications were required "for the sole purpose of reducing the amount of money that the state otherwise would have paid as just compensation."

Again, a similar contention was addressed in *Lundberg*. There, the defendants claimed that Portland had adopted its sidewalk dedication ordinance *"in order*

---

[3] For the same reasons, the court did not err in declining defendants' requested jury instruction, which would have told the jury to disregard evidence concerning dedication requirements.

to depress property values before the state undertook condemnation actions." 312 Or at 579. (Emphasis in original.) The Supreme Court examined the evidence and concluded that the defendants had failed to provide support for their claim that the city had promulgated its dedication ordinance in order to reduce the value of the property at a time when the state was committed to condemning the property. In the present case, the challenged dedication policy is contained in an annexation ordinance, McMinnville Ordinance No. 4357, which requires that annexed property be located within the city's urban growth boundary and contiguous to the existing city limits.[4] The ordinance also provides, as a "policy" that is applicable to all annexation requests, that "[a]n adequate level of urban services must be available or made available, within three years time [*sic*] of annexation." The ordinance defines "adequate level of urban services" to include municipal sewer service, municipal water service and

> "[r]oads with an adequate redesign capacity for the proposed use and projected future uses. Where construction of the road is not deemed necessary within the three-year time period, *the City shall note requirements such as dedication of*

---

[4] In its "statement of purpose," the annexation ordinance states that the city "Recognizes that the development of lands at an urban density must include the provision of an adequate level of required urban services such as sewer, water, and roads. Policies and procedures adopted in this ordinance are intended to carry out the directives of the McMinnville Comprehensive Plan, and to insure that annexation of lands to the City is incorporated into the process of providing a timely and orderly conversion of lands to urban uses."

> *right-of-way*, waiver of remonstrance against assessment for road improvement costs, or participation in other traffic improvement costs, for application at the appropriate level of the planning process. The City shall also consider public costs for improvement and the ability of the City to provide for those costs." (Emphasis supplied.)

In sum, the challenged policy ensures that the specified urban services are provided to properties that are annexed to the city, and it allows the city to require applicants to absorb some of the costs associated with the provision of those services by dedicating land, waiving objections to future assessments, or paying for the costs associated with other traffic improvements. Here, as in *Lundberg*, defendants

> "have offered nothing more than the existence of the [challenged] ordinance and the existence of the state's project to support their claims that the purpose of the ordinance was to depress property values in contemplation of the state's condemnation proceedings. Defendants also have not shown that at the time of the enactment of the ordinance the state was committed to its * * * project." 312 Or at 580.

The record shows that the city originally conceived of widening the highway and constructing a bypass as early as the 1960's. It included that concept in its 1971 comprehensive plan, which required the city to develop an access plan, including left-turn lanes and frontage roads, to accommodate development in the relevant area. McMinnville Ordinance No. 4357 was passed on February

4, 1986. Plaintiff brought this action to condemn defendants' property in 1989. Defendants have not provided any evidence to support their allegation that the city applies its policy "for the sole purpose of reducing the amount of money" that the state would otherwise have to pay as just compensation. Moreover, the requisite nexus exists between the increased need for proper traffic circulation created by proposed industrial development and the dedication of a portion of defendants' land to a highway widening project that would obviate the need for the city to build a frontage road. *See Dolan v. City of Tigard*, 317 Or 110, 120-21, 854 P2d 437 (1993).

Next, defendants challenge the following instruction that was given to the jury:

> "In arriving at the fair cash market value of the property taken, you should base your verdict upon the highest and best use of the property being taken as allowed by existing land use regulations such as zoning or dedication requirements."

Defendants contend that the instruction was incorrect as a matter of law, because it "told the jury to consider *only existing* zoning requirements." (Emphasis in original.) They argue that, because the existing zoning of their property was agricultural, the jury was, in effect, told to disregard defendants' evidence of the probability of a zone change to light industrial use. We do not read the jury instruction in such a limiting light. By referring to "existing land use regulations such zoning or dedication requirements," the instruction directed the jury's attention to the various regulations that had been discussed during trial: the property's agricultural zoning, city land

use regulations that would be relevant if defendants sought annexation and a zone change, and the dedication requirements to which defendants might be subjected upon annexation. If the instruction had sought to limit the jury's consideration to only the property's value in its present agricultural zone, logic requires that it would not have also referred to the dedication requirement, which was applicable only upon annexation. The trial court did not err in rejecting defendants' challenge to the instruction.

Defendants next assign error to the court's receipt of evidence of improvements in safety and other benefits of the highway project to other land owned by defendants. Before trial, defendants moved *in limine* "to restrict evidence of * * * general or special benefits" attributable to the highway project. The motion was granted. However, the court later allowed a witness to testify, over defendants' objection, that, before the highway project, a property owner would have had to pay for a frontage road. Plaintiff argues that the evidence was admissible, because it was relevant to establish the property's fair market value and was cumulative of testimony that had earlier been received without objection. We need not decide the question because, although defendants argue that the court erred in failing to sustain their objections, they fail to address the dispositive issue of whether the alleged error was prejudicial. Given that evidentiary error is not presumed to be prejudicial, OEC 103(1), under these circumstances, we decline to engage, *sua sponte*, in an analysis of whether the alleged error was reversible.

Defendants' remaining assignments are directed at the admission of testimony, elicited by plaintiff during

cross-examination of defendants' valuation expert, regarding the prices at which nearby properties were sold after the highway project became known. They argue that the sales should not have been used as "comparables," because they occurred while condemnation was anticipated.

In *Highway Commission v. Callahan*, 242 Or 551, 553, 410 P2d 818 (1966), the Supreme Court considered the propriety of a trial court's decision to exclude such testimony and held:

> "In order for the sale price to be admissible, the property must not only have been reasonably comparable to the property sought to be condemned, but its sale must also have been made under normal and fair market conditions. A sale price affected by the state's contemplated improvement of a highway and subsequent condemnation of adjacent property would not be such a sale. * * * Admissibility of evidence of sales of other land is largely within the discretion of the trial court."

Here, defendants themselves opened the door to evidence of comparable sales through the testimony of their own expert, and their subsequent attacks on the helpfulness of the "comparables" clearly conveyed to the jury their position that such evidence should be given little weight. Considered in that context, we cannot say that the trial court abused its discretion or committed reversible error when it allowed the challenged testimony.

Affirmed.

APPENDIX B

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON, by and through its Department of Transportation, Plaintiff-Respondent, v. FLOYD THOMAS ALTIMUS and JANICE M. CHURCH, Defendants-Appellants, and RUSSELL OLSON, Defendant.	Yamhill County Circuit Court No. CV 89-137 CA A66578 SC S40952 **ORDER DENYING RECONSIDERATION**

The Court of Appeals has considered the Petition for Review filed in this case as a Petition for Reconsideration and has denied the petition. ORAP 9.15. The Supreme Court may now proceed to determine whether to grant review. The appellate court decision is not enforceable until the Supreme Court has completed its review of the petition. ORAP 14.05.

S/W.L. RICHARDSON
WILLIAM L. RICHARDSON
CHIEF JUDGE

February 2, 1994
DATE

c: Jas. Jeffrey Adams — Attorney for Respondent
Charles F. Hudson — Attorney for Appellants
George W. Mead, Jr. — Attorney for Appellants

APPENDIX C

IN THE SUPREME COURT OF THE
STATE OF OREGON

STATE OF OREGON, by and through its Department of Transportation, Plaintiff-Respondent, Respondent on Review, v. FLOYD THOMAS ALTIMUS and JANICE M. CHURCH, Defendants-Appellants, Petitioners on Review, and RUSSELL OLSON, Defendant.	) Yamhill County Circuit Court No. CV 89-137 CA A66578 SC S40952 **ORDER DENYING REVIEW**

The Court has considered the petition for review and ORDERS that it be denied.

Dated this 1st day of March, 1994.

/s/ WALLACE P CARSON, JR.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

c: Jas. Jeffrey Adams	Attorney for Respondent on Review
Charles F. Hudson	Attorney for Petitioners on Review
George W. Mead, Jr.	Attorney for Petitioners on Review

APPENDIX D

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON, by and through its Department of Transportation, Respondent, v. FLOYD THOMAS ALTIMUS and JANICE M. CHURCH, Appellants, and RUSSELL OLSON, Defendant.	Yamhill County Circuit Court No. CV 89-137 CA A66578 **ORDER HOLDING APPEAL IN ABEYANCE**

Appellants have moved to hold the issuance of the appellate judgment in abeyance pending disposition of their petition for certiorari to the United States Supreme Court. The motion is granted.

/s/ W.L. RICHARDSON
Chief Judge

APR 11 1994
Date

cc: Charles F. Hudson
George W. Mead, Jr.
Jas Jeffrey Adams
Yamhill County Circuit Court Clerk

REPLIES SHOULD BE DIRECTED TO THE STATE COURT ADMINISTRATOR, RECORDS SECTION, SUPREME COURT BUILDING, 1163 STATE STREET, SALEM, OR 97310

[The foregoing order, which delays the transmission of the appellate judgment to the trial court, was entered pursuant to Oregon Rule of Appellate Procedure 14.10, providing for "stay of issuance of the appellate judgment, or a recall thereof, pending the filing of and action on an appeal or petition for a writ of certiorari to the Supreme Court of the United States".]

APPENDIX E

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, by and through its Department of Transportation, Plaintiff-Respondent, v. FLOYD THOMAS ALTIMUS and JANICE M. CHURCH, Defendants-Appellants, and RUSSELL OLSON, Defendant.	CA A66578 TC No. CV89-137 **ORDER GIVING LEAVE UNDER ORS 19.033(4)**

Pursuant to the motion of defendants-appellants Altimus and Church, and ORS 19.033(4), the Court determines that the judgment being appealed is not a final judgment because neither the adjudicative portion of the judgment being appealed or any other judgment in the trial court file disposes of plaintiff's claims against Russell Olson, against whom an order of default was entered. The Court further determines that the trial court intended to enter final judgment in this case.

Therefore, pursuant to ORS 19.033(4), the Court gives the trial court leave, on motion of any party, to enter a corrected judgment. Upon entry of a corrected judgment, appellants shall file an amended notice of appeal. Upon

the filing of an amended notice of appeal, the Court shall deem the appeal to have been taken from the corrected judgment and the appeal will proceed.

The appeal will be held in abeyance pending the filing of the amended notice of appeal; and the appellants shall have 14 days from the date of entry of the corrected judgment to file an amended notice of appeal and their opening brief.

/s/ W.L. RICHARDSON
Presiding Judge

SEP 3 1991
Date

c: Virginia L. Linder
Roger R. Warren
Charles F. Hudson
Yamhill County Circuit Court Clerk

APPENDIX F

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF YAMHILL

STATE OF OREGON, by and through its Department of Transportation, Plaintiff,	)	No. CV 89-137
v.	)	CORRECTED JUDGMENT
FLOYD THOMAS ALTIMUS and JANICE M. CHURCH; and RUSSELL OLSON, Defendants.	)	

The above-entitled matter came on regularly for trial on the 26th day of June, 1990, before the Judge of the above-entitled court, plaintiff appearing by and through Roger R. Warren of its attorneys; and the defendants Floyd Thomas Altimus and Janice M. Church appearing by and through George W. Mead, Jr. and Robert E. Maloney, Jr., their attorneys; and

It appearing to the court and the court now finds that an Order of Default has been entered herein against Russell Olson, defendant herein; and

It appearing to the court and the court now finds that the real property described in plaintiff's Complaint on file herein is necessary for public use; and

It appearing to the court and the court now finds that the plaintiff, prior to the commencement of this action

and pursuant to its resolution, attempted to acquire said real property by agreement and purchase, but was unable to do so; and deposited the balance of the verdict over and above the said $6,300 heretofore deposited, the added sum of $700, plus interest at 9% per annum from May 31, 1989, the date the plaintiff took possession of the property described herein, to the date of payment, and that plaintiff is now entitled to judgment herein; now, therefore.

IT IS HEREBY ORDERED AND ADJUDGED by this court as follows:

1.

Plaintiff shall have judgment of default against defendant Russell Olson without costs and disbursements.

2.

That the real property hereinafter described be, and the same hereby is appropriate [sic] for public purposes; and title to said property, together with all rights and easements therein be, and the same herein is vested in the State of Oregon, by and through its Department of Transportation, free and clear of all liens and encumbrances. Said real property so appropriated is described on the attached Exhibit A.

> The legal description of said property is as set out in Exhibit A attached hereto and by this reference made a part hereof.

The use to be made of each parcel is as follows:

Title in fee simple to the property described as Parcel 1.

All abutter's rights of access to the right of way of the highway project, except that there shall be no restriction of access to a frontage road to be constructed as part of the work and cost of the project, on the southerly side of the Salmon River Highway. The frontage road will connect with the highway in the vicinity of Engineer's Station 713+00.

A permanent easement across the property described as Parcel 2, for the purpose of constructing, reconstructing, operating and maintaining slopes, power line, telephone, T.V. cable and water line facilities. Since fee simple title is not being acquired, any use may be made of the real property provided that such use shall not interfere with the purpose of this easement or endanger the lateral support of the highway.

3.

That plaintiff shall recover of and from the defendant the sum of $108.00 as their costs and disbursements taxed herein.

DATED this 18 day of Sept., 1991.

/s/ WAYNE R. HARRIS
CIRCUIT COURT JUDGE

ENTERED: September 19, 1991

APPENDIX G

CIRCUIT COURT OF OREGON

YAMHILL COUNTY

STATE OF OREGON, by and through its department of transportation, Plaintiff, v. FLOYD THOMAS ALTIMUS and JANICE M. CHURCH; AND RUSSELL OLSON, Defendants.	)	No. CV 89-137 FINAL JUDGMENT

The above-entitled matter came on regularly for trial on the 26th day of June, 1990, before the Judge of the above-entitled court, plaintiff appearing by and through Roger R. Warren of its attorneys' and the defendants Floyd Thomas Altimus and Janice M. Church appearing by and through George W. Mead, Jr. and Robert E. Maloney, Jr., their attorneys; and

It appearing to the court and the court now finds that an Order of Default has been entered herein against Russell Olson, defendant herein; and

It appearing to the court and the court now finds that the real property described in plaintiff's Complaint on file herein is necessary for public use; and

It appearing to the court and the court now finds that the plaintiff, prior to the commencement of this action and pursuant to its resolution, attempted to acquire said

real property by agreement and purchase, but was unable to do so; and

A jury having been called, examined, and duly empaneled and sworn; a view of the proposed acquisition having been held in the manner provided by law; the parties having made their opening statements; the parties having adduced evidence in support of their contentions; arguments by respective parties having been made to the jury, the jury having been regularly instructed in the law and having retired for deliberations did, on the 28th day of June, 1990, return its verdict, which verdict, omitting the title of the court and cause, is in the words and figures as follows:

> "We, the jury, being duly empaneled and sworn to try the above-entitled case, find just compensation to be paid for the acquisition to be $7,000.
>
> DATED this 28th day of June, 1990.
>
> /s/ Susan Kaufman
> Foreperson."

It appearing to the court and the court now finds that the amount of the verdict of the jury was less than plaintiff's tender made in writing more than 30 days prior to trial, and that plaintiff therefore is entitled to its costs and disbursements incurred herein;

It appearing to the court from files and records herein that on May 26, 1989, the plaintiff heretofore deposited the sum of $6,300 with the Clerk of the Court for the use and benefit of the defendants herein; and

It further appearing to the Court that plaintiff has now deposited the balance of the verdict over and above

the said $6,300 heretofore deposited, the added sum of $700, plus interest at (9% per annum from May 31, 1989, the date the plaintiff took possession of the property described herein, to the date of payment, and that plaintiff is now entitled to judgment herein; now, therefore,

IT IS HEREBY ORDERED AND ADJUDGED by this court as follows:

1.

That the real property hereinafter described be, and the same hereby is appropriated for public purposes; and title to said property, together with all rights and easements therein be, and the same herein is vested in the State of Oregon, by and through its Department of Transportation, free and clear of all liens and encumbrances. Said real property so appropriated is described on the attached Exhibit A.

> The legal description of said property is as set out in Exhibit A attached hereto and by this reference made a part hereof.
>
> The use to be made of each parcel is as follows:
>
> Title in fee simple to the property described as parcel 1.
>
> All abutter's rights of access to the right of way of the highway project, except that there shall be no restriction of access to a frontage road to be constructed as part of the work and cost of the project, on the southerly side of the Salmon River Highway. The frontage road will connect with the highway in the vicinity of Engineer's Station 713+00.

A permanent easement across the property described as Parcel 2, for the purpose of constructing, reconstructing, operating and maintaining slopes, power line, telephone, T.V. cable and water line facilities. Since fee simple title is not being acquired, any use may be made of the real property provided that such use shall not interfere with the purpose of this easement or endanger the lateral support of the highway.

2.

That plaintiff shall recover of and from the defendant the sum of $108.00 as their costs and disbursements taxed herein.

DATED this 5 day of Sept., 1990.

/s/ WAYNE R. HARRIS
CIRCUIT COURT JUDGE

ENTERED: September 6, 1990

APPENDIX H

ORDINANCE NO. 4248

An Ordinance rezoning certain property from a County EF-40 (exclusive farm use, 40-acre minimum) zone to a City M-L PD (limited light industrial planned development) zone on a parcel of land approximately 38.37 acres in size located south of Three Mile Lane.

RECITALS:

The Planning Commission received an application for a zone change (ZC 2-83) dated February 11, 1983, on the property described as a portion of Tax Lot 200, Section 27, T. 4 S., R. 4 W., W.M.

* * *

THE CITY OF McMINNVILLE ORDAINS AS FOLLOWS:

* * *

Section 2. That the property described . . . shall be rezoned . . . subject to the following conditions:

* * *

5. That a 40-foot wide strip of land adjacent to Highway 18 be dedicated to the State for right-of-way prior to the development plan approval. The 40 feet of right-of-way will provide a total right-of-way of 100 feet which, according to preliminary plans, should provide enough land area for the widening of Highway 18.

Passed by the Council this 3 day of May, 1983, . . .

Approved this 3 day of May, 1983.

/s/ Jerry Allen
COUNCIL PRESIDENT

ORDINANCE NO. 4306

An Ordinance rezoning certain property from an County EF-40 (exclusive farm use, 40-acre minimum) zone to a City M-L PD (limited light industrial planned development) zone on two parcels of land totaling approximately 51.23 acres located on the south side of Three Mile Lane.

RECITALS:

The Planning Commission received an application for a zone change (ZC 3-84) dated August 27, 1984, on the property described as Tax Lot 100 and a portion of Tax Lot 300, Section 27, T. 4 S., R. 4 W., W.M.

* * *

THE CITY OF McMINNVILLE ORDAINS AS FOLLOWS:

* * *

Section 2. That the properties described . . . shall be rezoned . . . subject to the following conditions:

* * *

4. That a 60-foot wide strip of land adjacent to Highway 18 be dedicated to the state for right-of-way prior to

the development plan approval. The 60 feet of right-of-way will provide a total right-of-way of 120 feet which, according to the State Department of Transportation, should provide enough land area for the widening of Highway 18.

Passed by the Council this 6 day of November, 1984, . . .

Approved this 6 day of November, 1984.

/s/ Edward J. Gormley
COUNCIL PRESIDENT

ORDINANCE NO. 4434

An Ordinance rezoning certain property from a County AF-20 (Agricultural/Forestry District) zone to a City M-2 PD (General Industrial Planned Development) zone on a parcel of land approximately 8.1 acres in size located south of Three Mile Lane, and declaring an emergency.

RECITALS:

The Planning Commission received an application from Evergreen Aviation Ground Logistics Enterprises for a zone change (ZC 6-88) dated August 16, 1988, for the property described as Tax Lots 300 and 400, Section 26, T. 4 S., R. 4 W., W.M.; and

* * *

THE CITY OF McMINNVILLE ORDAINS AS FOLLOWS:

* * *

Section 2. That the property described . . . is hereby rezoned . . . subject to the following conditions:

(a) That a 60 foot wide, more or less, strip of land adjacent to Highway 18 be deeded to the state for right-of-way prior to final occupancy of the site. The exact width of said strip of land will be determined by the Oregon Department of Transportation and shall correspond with that right-of-way actually needed for the improvement of Highway 18.

* * *

Passed by the Council this 23rd day of August, 1988, . . .

Approved this 23rd day of August, 1988.

/s/ Edward J. Gormley
MAYOR

ORDINANCE NO. 4357

An Ordinance enacting requirements and procedures for annexation of lands to the City of McMinnville and repealing Ordinance No. 4130.

* * *

THE CITY OF McMINNVILLE [sic] AS FOLLOWS:

* * *

Section 3. *Policies.* The following policies shall apply to all annexation requests:

* * *

(b) An adequate level of urban services must be available, or made available, within three years time of annexation. An adequate level of urban services shall be defined as:

* * *

(2) Roads with an adequate design capacity for the proposed use and projected future uses. Where construction of the road is not deemed necessary within the three-year time period, the City shall note requirements such as dedication of right-of-way, waiver of remonstrance against assessment for road improvement costs, or participation in other traffic improvement costs, for application at the appropriate level of the planning process. The City shall also consider public costs for improvement and the ability of the City to provide for those costs.

* * *

Section 13. *Coordination.* Annexation requests shall be coordinated with affected public and private agencies, including, but not limited to, Yamhill County, McMinnville Water and Light Department, McMinnville School District 40, Northwest Natural Gas, and where appropriate, various state agencies. Coordination shall be made by referral of annexation request to these bodies sufficiently

in advance of final city action to allow for reviews and recommendations to be incorporated into the city records.

* * *

Passed by the Council this 4 day of February, 1986, . . .

Approved this 4 day of February, 1986.

/s/ Edward J. Gormley
MAYOR

APPENDIX I

[At the beginning of trial, the court announced its ruling as follows:]

* * *

"THE COURT: There are several motions in limine to discuss before the jury comes in. Let's take them up. First of all, let me comment there was a matter we discussed in Chambers dealing with dedication and whether it would be admitted throughout these proceedings.

I'm going to allow it. I believe it is relevant. I'll allow Mr. Warren to withdraw the diagram which he displayed in Chambers." (I Tr 1-2)

* * *

[Petitioners raised the following assignments of error on appeal, including excerpts of record:]

Assignment of Error No. 1

The court erred in receiving evidence that defendants would have been required to deed much of the property being taken to the State to secure a zone change from the City following annexation.

After defendants had established a foundation through the preliminary testimony of Highsmith and Johnson, they moved the court to exclude evidence of any hypothesized dedication requirement applicable to their property:

[MR. MALONEY:]

> "So given the state of the record at this time on behalf of property owner I move the Court for an order limiting the State's Counsel and their witnesses from putting on before the jury

any evidence concerning the claimed requirement that there would be dedication required by the Churches of a portion of their property which the state has in their diagram delineated would be 70 feet for the following reasons.

"We maintain that there – to allow such evidence and to allow this theory of the State would be violating our Federal and State of Oregon constitutional right to just compensation for property that is taken, because it would deprive them of just compensation for that property." (II Tr 168)

* * *

"Because here the City is being put in a position by the State of theoretically that they would require a dedication by the Churches of 70 feet of their frontage to the State. That our people would have to donate 70 feet of their frontage to the State Highway Department. Not for a City street but for a state highway where the funds for this is all from the State of Oregon and from the Federal Government." (II Tr 170)

* * *

"THE COURT: Thank you. I ruled on the dedication evidence yesterday. I'll allow the evidence." (II Tr 178)

* * *

Assignment of Error No. 2

The court erred in refusing to instruct the jury to disregard evidence concerning dedication requirements.

Defendants requested the following jury instruction (No. 23):

> "Plaintiff (state) has presented evidence that in order for defendants' property to be used for other than agricultural purposes, the owners would be required to dedicate some or all of the property the state has taken for highway uses. I instruct you that for the purposes of this case you are not to consider such evidence. Your task in this case is to determine just compensation for the property taken, according to its highest and best use, without regard to any dedication requirement."

The court failed to give the instruction, and defendants excepted as follows:

> "MR. MALONEY: We except to the Court having failed to give our Requested Jury Instruction No. 23 which in effect requested a directed verdict on issues of dedication for the following reasons. First, the evidence in this case has shown, and has not been contradicted, that the City of McMinnville did not have the authority to require dedication in this case to the State Highway Department for a state highway.
>
> "Second, the evidence shows that any purported attempt to dedicate in that nature in this case was an unlawful delegation of authority by the City of McMinnville to the Oregon State Highway Department.

* * *

"Next, there is in fact no ordinance in place as of the date of taking that would have required our property owner to have dedicated any of her property to the State of Oregon or the City of McMinnville in connection with this project or in connection with the annexation or rezoning of the property.

"Next, under the Federal and State Constitutions which require just compensation, the use of the proposed concept of rededication in this case would violate the State and Federal Constitutions because it would result in our clients receiving less than just compensation. It would affect their rights to due process and to equal protection of the laws.

* * *

"Further that our clients would be denied due process and equal protection of the laws because they could not file a declaratory judgment action to have a declaration that the property would not be required to be dedication because there is no determination of the amount of or the need for dedication of their property before the taking by the State in this case.

"Second, they were not permitted to go to any hearing nor was there any hearing by the Planning Commission or the City Council with respect to whether any dedication would be required of my client's property and if so what amount would be required.

"Further, other property owners in the City of McMinnville have been permitted to have their properties rezoned or annexed or built

upon without any requirement that they dedicate any property to the State of Oregon for any highway project. That was admitted to. So my clients are being singled out and treated differently than other citizens within this community as far as that issue.

"Finally, that the proposed dedication that the State has urged would be in excess of any legitimate police power." (IV Tr 178-181)

* * *

[A petition for review in the Oregon Supreme Court raised the same issues:]

Questions Presented

1. Whether the Court of Appeals erred in upholding the admission of evidence that the City of McMinnville ("city") would have required defendants to dedicate much of the condemned property to the state without payment, in order to change the zoning of their parcel from agricultural to light industrial, when no city ordinance required a comparable dedication.

2. Whether such a policy of forced dedication would violate the Oregon and United States Constitutions.

Supreme Court, U.S.
FILED
SEP 1 1994
OFFICE OF THE CLERK

No. 93-1915

In the Supreme Court of the United States

OCTOBER TERM, 1994

FLOYD THOMAS ALTIMUS and
JANICE M. CHURCH,

Petitioners,

v.

STATE OF OREGON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF OREGON

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

THEODORE R. KULONGOSKI
Attorney General of Oregon
THOMAS A. BALMER
Deputy Attorney General
*VIRGINIA L. LINDER
Solicitor General
MICHAEL D. REYNOLDS
Assistant Solicitor General
JAS. ADAMS
Assistant Attorney General
400 Justice Building
Salem, Oregon 97310
Phone: (503) 378-4402
Counsel for Respondent

*Counsel of Record

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the standards used in regulatory takings cases for determining the constitutionality of exactions or dedications (*e.g.*, *Nollan v. Calif. Coastal Comm'n*; *Dolan v. City of Tigard*) should be used in a condemnation action to determine the admissibility of expert testimony on value based on the best and highest potential use of condemned property and the possible dedication that government might require were the property to be put to that use.

TABLE OF CONTENTS

	Page
Question Presented	i
Response to Petition for Writ of Certiorari	1
I. Overview of the Case and the Issue It Presents	1
II. The Appropriate Disposition of the Case	6
Conclusion	11

TABLE OF AUTHORITIES

Page

Cases Cited

Dept. of Transportation v. Lundberg, 312 Or. 568, 825 P.2d 641 *cert. denied*, 113 S.Ct. 467 (1992) 6

Dolan v. City of Tigard, 114 S.Ct. 2309 (1994) . . 1, passim

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 5, 7

Olson v. United States, 292 U.S. 246 (1934) 6

People ex rel. Dept. Pub. Wks. v. Investors Diversified Services, Inc., 262 Cal. App. 2d 367, 68 Cal. Rptr. 663 (App. 2d Dist. 1968) 11

Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 9

Yee v. City of Escondido, Cal., 503 U.S. ___, 112 S.Ct. 1522 (1992) 9

Other Authorities

5 NICHOLS ON THE LAW OF EMINENT DOMAIN, § 18.05[3] (3d ed. 1994) 9

Morrison, *Highest and Best Use of Property Taken Under Eminent Domain*, 19 AM. JR. PROOF OF FACTS 3d 613 (1993) 9

No. 93-1915

In the Supreme Court of the United States

OCTOBER TERM, 1994

FLOYD THOMAS ALTIMUS and JANICE M. CHURCH,

Petitioners,

v.

STATE OF OREGON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Petitioners have filed a petition for writ of certiorari asking this Court to grant review of a decision of the Oregon Court of Appeals. The appropriate disposition of this case is to deny the petition or, in the alternative, to grant the petition summarily, vacate the decision of the Oregon Court of Appeals and remand to that court for further consideration in light of the Court's recent decision in *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994).

I. *Overview of the Case and the Issue It Presents*

This is a condemnation action brought by the State of Oregon to acquire approximately two acres of a 13-acre parcel of land to widen a state highway ("Three Mile Lane") near the City of McMinnville. The case was tried in state circuit court solely on the question of valuation — that is, the "fair market value" to be paid as just compensation for the condemned property. The

evidence centered on the testimony of appraisal experts for both sides who had examined the property and formed opinions about the property's market worth. The appraisals offered by plaintiff State of Oregon's expert and that of the defendant landowners' experts were worlds apart, with the state's expert valuing the property at $5,300 and defendants' experts valuing it at $65,074 and $86,000.

The experts for both sides agreed that the condemned property's "best and highest" use is as light industrial land rather than farmland, as it is currently zoned.[1] The wide disparity between their valuations was a consequence of their differing appraisal approaches. In particular, they relied on different comparison sales to assess what a willing buyer would pay a willing seller for property like the property in question. The state's expert, for example, considered only properties zoned for light industrial use or a combination of light industrial and farm use; defendants' experts considered properties zoned for medium and heavy industrial use, and other commercial zoning. The state's expert considered only unimproved land like the subject property; the defendants' experts included comparison sales in which a portion of the sales price had been paid for buildings or other structures rather than for just the land. The state's expert looked to comparisons sales involving only large acreages that had sold on a price-per-acre basis; defendants' experts considered sales of small acreages where the price was set on a per-square-foot basis. The state's expert considered only sales of comparable

---

[1]Under the controlling local comprehensive land use plan and ordinances, the property is designated for light industrial use. The record establishes that the defendant property owners could have applied to have the property's zoning changed from farm use to light industrial and that the request would have been routinely allowed if combined with a request for annexation to the City.

properties in the immediate geographic vicinity of the defendants' property; defendants' experts considered sales within a broader geographic range.[2]

In addition to their different selection of comparison sales, the experts disagreed on the effect that demand for and supply of light industrial property might have on the property's value. Defendants' experts did not rely on any specific assessments of demand in their appraisals.[3] The state's expert believed that supply and demand was relevant to assessing market value. He found that there was a surplus of light industrial land in the area and concluded that a demand to develop the land in question probably would not arise for 10 years or so.[4]

Finally, the state's expert took into account the possibility that, as a condition for changing the parcel's zoning from farm use to light industrial, the city might require dedication of a 60–70 foot strip of the land for purposes of widening the abutting highway. Under the local land use plan, the city is obligated to provide the necessary improvements to the road system before intensifying the uses of the land in the area in question, and it has authority to require dedication of land needed for that purpose from property owners seeking to develop their property.[5] The

---

[2]Tr. Vol. IV, 28–98.

[3]Tr. Vol. II, 211–13 (Henry); Tr. Vol. II–III, 276–86 (Dell); 348–408 (Dawell).

[4]Tr. Vol. IV, 22–27.

[5]McMinnville's comprehensive plan, formulated in 1971, states in relevant part:

> The City of McMinnville shall develop an access plan to accommodate developments on Three Mile Lane (State Highway 18). The plan shall include specific details concerning the location of access points, the provision of left-turn refuges and acceleration-

(continued...)

state's expert placed the market value at $3,500 an acre for the portion of the property that could be zoned and used as light industrial, and $2,000 an acre for the farm use value of the 70-foot portion that he thought likely would have to be dedicated if the property were rezoned. Because each portion of the property was slightly under an acre, he appraised the total value at $5,300.[6]

---

[5](...continued)

deceleration lanes, the connection of properties through an internal circulation system of roads, the responsibility for costs and the timing of required improvements.

(Ex. 104, § 124.00, pp 22-23). McMinnville's Ordinance 4131, which was enacted in 1981 to set forth generally the conditions for development applicable to properties adjacent to Oregon Highway 18, provides as follows:

> The City of McMinnville finds that the development of lands on the north and south sides of Three Mile Lane (Oregon Highway 18) is acceptable if provisions are made to integrate the dual functions of the highway as a by-pass around the City and a land service arterial for adjacent properties. * * *.
>
> * * * * *.
>
> [Section 4] (c) Access requirements adopted hereafter in an access plan for this area shall be adhered to. Provisions of the plan shall include:
>
> 1. The minimization of entrances onto Three Mile Lane,
>
> 2. The development of on-site circulation systems, connecting to adjoining properties,
>
> 3. The provision of acceleration-deceleration lanes and left turn refuges when and where necessary and practicable.

(Ex. 3). Section 17.51.030(E) of McMinnville's general zoning ordinance provides that in approving planned developments, the city may attach conditions to carry out the purpose of the zoning ordinance, as long as needed housing is not excluded or planned densities unnecessarily reduced. (Ex. 105, pp 52-53).

[6]Tr. Vol. IV, 38-41. The expert did not assign a "zero value" to the portion that might be subject to the dedication. Rather, he reasoned that the "best and highest use" of that portion was as farmland, because it could be

(continued...)

Defendants' experts believed that buyers generally do not consider dedication requirements in determining how much to pay for property and, moreover, that the possibility of a dedication in this instance was too speculative and remote.[7] They therefore valued the entire property on the basis of its use as light industrial land. One of defendants' experts placed the value at $86,000 and the other placed it at $65,074. They testified that, were they to reduce their appraisals on the assumption that 70 feet of the property would be validly dedicated for highway widening as a condition of the change of use, their valuations would be $46,970 and $34,650, respectively.[8]

At trial, defendants objected to any valuation evidence that took into account the possible dedication on the theory that for the city to require the dedication would be unconstitutional.[9] The trial judge admitted the state's valuation into evidence over defendants' objection and instructed the jury, again over defendants' objection, that the evidence could be considered for

---

[6](...continued)

used as farmland indefinitely without being subject to the dedication requirement. Thus, he valued that portion as farmland, and placed "best and highest use" of the remainder at the value he determined the market would bear for light industrial property. Tr. Vol. IV, 20, 38-39.

[7]Tr. Vol. III, 247-49, 304-10, 319-20 (Dell); 368 (Dawell).

[8]Tr. Vol. III, 394 (Dawell) and 300 (Dell).

[9]Defendants claimed that evidence of the dedication was unconstitutional because the dedication itself would be unconstitutional under *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), thus invoking the Just Compensation Clause of the Fifth Amendment. Defendants also, at trial and on appeal, made less precise references to general due process and equal protection claims. They press those arguments again in their certiorari petition, again in vague form only, without suggesting any independent equal protection or due process principle that adds to or changes the analysis under the Just Compensation Clause.

whatever weight the jury might give it in assessing the property's true market value. The jury returned a verdict for $7,000.

II. ***The Appropriate Disposition of the Case***

Petitioners sought compensation for their property not on the basis of their current use of the subject parcel as farmland, but on the basis of its possible future use as light industrial. In condemnation cases, for purposes of assessing constitutionally required compensation, property typically is to be valued at "best and highest use," which may take into account the most profitable future use to which the property is reasonably likely to be put. *See generally Dept. of Transportation v. Lundberg*, 312 Or. 568, 574–75, 825 P.2d 641 *cert. denied*, 113 S.Ct. 467 (1992) (citing cases and authorities); *Olson v. United States*, 292 U.S. 246, 255 (1934)(highest and most profitable use is that to which the property is adaptable or likely to be put in the reasonably near future). Although petitioners desired to have the condemned property valued on the basis of its potential future use, they wanted the jury to be insulated from any evidence that, as a condition of rezoning the property for that use, the landowner might have to dedicate a portion of the land for widening the highway that the property borders. In the petition for certiorari, petitioners urge that in the absence of an inquiry into the specific needs for a dedication created by the property's potential future use, valuation evidence that took into account the possibility of the dedication violated the Fifth Amendment.

The Oregon Supreme Court has held, unremarkably, that evidentiary use in a condemnation action of a "valid" regulation of a condemnee's land is an admissible and relevant factor in determining just compensation. *Dept. of Trans. v. Lundberg*, 312 Or. at 578; *accord Dept. of Trans. v. Altimus*, Pet. Cert. App. 6. But unlike a "regulatory takings" case, in a condemnation

action the question whether government may "validly" condition development of property on a dedication or exaction arises only indirectly. Here, government has not sought to require an uncompensated dedication of land as a condition of a specific development proposed by a landowner. Rather, the "validity" of the dedication arises only in relation to a determination of what value to place on a parcel of property that government is taking by condemnation and for which it is willing to pay.

When the Oregon Court of Appeals decided this case, the most recent guidance on the constitutionality of government imposed regulatory dedications was this Court's decision in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and the Oregon Supreme Court's decision in *Dolan v. City of Tigard*, *supra*. Under both decisions, the validity of a governmental condition on land development requires an examination of the "nexus" between the impacts of the development and the purpose to be served by the governmental condition. Applying the standards announced in those cases for determining the validity of a dedication in a regulatory takings context, the Oregon Court of Appeals found that the dedication in this case was constitutional. It held that "the requisite nexus exists between the increased need for proper traffic circulation created by proposed industrial development and the dedication of a portion of defendants' land to a highway widening project that would obviate the need for the city to build a frontage road." Pet. Cert. App. 10.

After the Oregon Court of Appeals issued its decision, this Court granted certiorari in *Dolan* and reversed the Oregon Supreme Court's judgment. 114 S.Ct. 2309 (June 24, 1994). In doing so, the Court expanded on the "nexus" requirement articulated in *Nollan*. It announced that the examination of the "substantial nexus" between the impacts of development and

regulation of that development was only half of a two-part inquiry. In addition to requiring an examination of the *nature* of the condition placed on the development, validity of a governmental exaction turns also on the *extent* of the condition. 114 S.Ct. at 2319-20. The Court termed the appropriate standard "rough proportionality." 114 S.Ct. at 2319. Mathematical precision is not required, but there must be some sort of determination that the required dedication is related in extent to the anticipated impacts of the development. 114 S.Ct. at 2319-20. Thus, at least in the context of a regulatory takings case, the Court's decision in *Dolan* requires some form of the more specific inquiry that petitioners suggest should be required in a condemnation action.

Rather than suggest that the issue presented merits a grant of certiorari, the Court's decision in *Dolan* demonstrates that the petition should be denied. The Oregon Court of Appeals was undoubtedly correct in concluding that the requisite "nexus" exists between the impacts of the potential development of the condemned property and the need for highway improvement. In *Dolan*, the Court recognized that reducing traffic congestion is a legitimate public purpose that bears a substantial nexus to the impacts of more intensified commercial land use: "Dedications for streets, sidewalks, and other public ways are generally reasonable exactions to avoid excessive congestion from a proposed property use." 114 S.Ct. at 2321. *Dolan* thus validates the Oregon Court of Appeals' conclusion that the nexus requirement was facially satisfied by the potential dedication of a strip of the landowner's property as a condition for changing its use to light industrial, a use that would have an unquestionable impact on traffic flow in that area.

Beyond that, petitioners simply seek to overlay onto the condemnation context an inquiry that has no proper application there. The *Dolan* proportionality examination logically cannot be made when there is no specific development proposal by a landowner to change the use of the property and when the government is not yet insisting on applying any dedication. Similarly, it makes no legal sense to assess whether the potential scope of a dedication satisfies *Dolan*'s proportionality test in circumstances where a takings claim is not even ripe because the dedication requirement is as yet hypothetical only. *Cf. Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 191 (1985)(a taking claim is premature in the absence of a final, definitive position by government on how regulations will be applied to a particular piece of land). In effect, *Dolan* announces an "as applied" test for regulatory takings that can and should have no application in this context. If a potential dedication is not facially unconstitutional, so that it cannot be said that it has no valid application to any set of circumstances,[10] any issue about application of the dedication as it bears on best and highest use of condemned property for valuation in a condemnation case properly is left to expert opinion, with opportunities for cross examination and for the jury to give whatever weight it may choose to those opinions.[11]

---

[10]*See Yee v. City of Escondido, Cal.*, 503 U.S. ___, 112 S.Ct. 1522, 1532 (1992).

[11]That approach is the general solution for the myriad questions that typically surround prospective uses to which the property may put. *See generally* 5 NICHOLS ON THE LAW OF EMINENT DOMAIN, § 18.05[3] (3d ed. 1994); Morrison, *Highest and Best Use of Property Taken Under Eminent Domain*, 19 AM. JR. PROOF OF FACTS 3d 613 (1993). There is no reason to take a different approach in considering limitations or conditions that may be placed on those prospective uses.

The petition should be denied for a second and independent reason. The record strongly suggests that the evidence of the dedication played no part in the jury's award of compensation.[12] Because of that, even if this Court were to grant the petition, its review of the issue would be complicated by the fact that it may not be squarely presented by the verdict in the case. The Court might reach the evidentiary question only to conclude that it should not resolve it because the evidence was not prejudicial in any event and the jury's verdict should not be disturbed.

Alternatively, the Court at most should vacate the Court of Appeals' judgment and remand this case to the Oregon Court of Appeals for further consideration in light of this Court's decision in *Dolan*. The state courts have never had an opportunity to decide, in the first instance, whether the kind of inquiry *Dolan* demands in a regulatory takings context should apply when dedications or exactions are considered for purposes of determining value in a condemnation action. Obviously, the contexts are meaningfully different. If at some point the question merits this Court's attention, the Court's review may be better informed if lower courts generally have first had the opportunity to reach some consensus, or lack of consensus, on how the issue

---

[12]As already described, the state's expert valued the property at approximately $5,300, a value that reflected industrial use for half of it, and farm use for the half that would potentially have been subject to dedication. The jury awarded $7,000 in compensation. Necessarily, the jury completely rejected the basis on which defendants' experts valued the property, which even accounting for the potential dedication would have been at least $34,650. The only logical explanation for the jury's award is that the jury accepted the state expert's value of $3,500 per acre for light industrial use, applied that figure to all of the property (including the portion that might be subject to dedication), and rounded the amount of property to an even two acres, thus awarding $7,000 in total.

should be resolved.[13] Moreover, application of *Dolan* to this case would trigger the need for a fact-bound, case-specific examination of the particular trial record developed. That examination should be made first by the state court. At this juncture, the case does not justify an extraordinary grant of this Court's certiorari jurisdiction or an expenditure of this Court's limited resources.

CONCLUSION

The Court should deny the petition of writ of certiorari.

Respectfully submitted,

THEODORE R. KULONGOSKI
Attorney General of Oregon
THOMAS A. BALMER
Deputy Attorney General
VIRGINIA L. LINDER
Solicitor General
MICHAEL D. REYNOLDS
Assistant Solicitor General
JAS. ADAMS
Assistant Attorney General
Counsel for Respondent

September 2, 1994

---

[13]Although the petition for certiorari tries to argue that the issue this case presents "arises with increasing frequency," (Pet. Cert. Question Presented), petitioners are not able to show that it has been the subject of numerous lower court decisions, or that there is any significant split of authority on the question at lower court levels. To the contrary, the circumstances presented by this case appear rarely to generate case law. Lower court cases that are on point are in basic accord with the Oregon Court of Appeals resolution of this case. *See, e.g., People ex rel. Dept. Pub. Wks. v. Investors Diversified Services, Inc.*, 262 Cal. App. 2d 367, 68 Cal. Rptr. 663 (App. 2d Dist. 1968). Whether the issue will arise with any greater frequency in the aftermath of the *Dolan* decision remains to be seen.

Supreme Court, U.S.
FILED
SEP 27 1994
OFFICE OF THE CLERK

No. 93-1915

In The

Supreme Court of the United States

October Term, 1994

FLOYD THOMAS ALTIMUS
and
JANICE M. CHURCH,

Petitioners,

v.

STATE OF OREGON,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Oregon

REPLY BRIEF

CHARLES F. HUDSON*
ROBERT E. MALONEY, JR.
LANE POWELL SPEARS LUBERSKY
Suite 800
520 S.W. Yamhill Street
Portland, Oregon 97204
(503) 226-6151

GEORGE W. MEAD, JR.
1480 Pacific First Federal Building
851 S.W. Sixth Avenue
Portland, Oregon 97204
(503) 228-7686

*Counsel of Record

Counsel for Petitioners

September, 1994

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

No. 93-1915

In The

Supreme Court of the United States

October Term, 1994

FLOYD THOMAS ALTIMUS
and
JANICE M. CHURCH,

Petitioners,

v.

STATE OF OREGON,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Oregon

REPLY BRIEF

The State of Oregon begins its response in No. 93-1915 with the concession that it would be appropriate "in the alternative" to grant the petition, vacate, and remand for further consideration in light of the Court's intervening decision in *Dolan v. City of Tigard*, 114 S Ct 2309 (1994). Response at 1. Thereafter, the state avoids directly addressing the issues presented in the petition, and instead raises a series of collateral arguments. A few of the state's assertions merit some reply.

Respondent does not challenge the record presented in the petition; however, in the first half of its brief, the

state undertakes a subtle redefinition of the evidentiary rulings which are at issue. After a long and selective characterization of some of the *other* evidence presented at trial, the state indicates that "[f]inally" its expert "*took into account* the *possibility* that * * * the city *might* require dedication of a 60-70 foot strip of land." Response at 3 (emphasis added). Defendants, on the other hand, "wanted the jury to be insulated from *any* evidence that- * * * the landowner *might* be required to dedicate *a portion* of the land." *Id.* at 6 (emphasis added).

In fact, petitioners' constitutional objections were directed at the specific evidence received, which involved the state's assertion, through expert testimony and demonstrative exhibits, that petitioners *would* have been required to dedicate 70 feet of land to the same project for which their property was being condemned. Petition at 4-6; App 32-33. This requirement, which exceeded any potential local exaction in the absence of the project, was presented as a certainty, not a possibility. *Id.* The issue presented in the petition is not whether *any* evidence of a local dedication requirement may be relevant in a condemnation action, but rather whether such evidence is subject to *any* constitutional restraint.

The state's primary response, analyzing this Court's decision in *Dolan*, seems to be that its evidence should be exempt from constitutional scrutiny based on the context in which it arises. The state explains that because a particular development on the property cannot be precisely defined, there is no basis on which to challenge the evidentiary use of a hypothetical exaction – even one that admittedly exceeds *any* which the locality might have

applied in the absence of the state's project.[1] According to the state's analysis, the standard of rough proportionality, which *Dolan* establishes, disappears when the requirement is imposed "hypothetically" by a condemnor.

A similar irony is inherent in the state's related suggestion that "it makes no legal sense" to apply *Dolan* "where a takings claim is not even ripe because the dedication requirement is as yet hypothetical only." Response at 9. As defendants in a state-initiated action in eminent domain, petitioners had no prior opportunity to challenge the "hypothetical" exaction at issue here. And if the state can dispose of their challenge now, it can rest secure in the knowledge that the kind of takings claim it describes will never ripen. For the citizen whose property is being taken, the unregulated use of such evidence has an impact that is far from hypothetical. If the Constitution's guarantee of just compensation is to have meaning for petitioners and others like them, the use of such evidence must not be immune to scrutiny.

As a "second and independent reason" that the petition should be denied, the state suggests that the evidence received may not have affected the jury's verdict. Response at 10. Interpreting that verdict for this Court, the state asserts:

---

[1] Petition at 5-6 (I Tr. 125-130, 131-32). For this reason, in petitioners' view, the exactions proposed in this case failed to satisfy "even the most untailored standards," and were subject to reversal even if this Court had affirmed in *Dolan*. *See Nollan v. California Coastal Comm'n*, 483 US 825, 838 (1987).

> " * * * The *only* logical explanation for the jury's award is that the jury accepted the state expert's value of $3,500 per acre for light industrial use, applied that figure to all of the property (including the portion that might be subject to dedication), and rounded the amount of property to an even two acres, thus awarding $7,000 in total." Response at 10, n 12. (emphasis added).

Of course this is just the opposite of what the state told the Oregon Court of Appeals:

> "In reaching its verdict of $7,000, which is consistent with the evaluation of the state's expert, the jury *necessarily* found that the city's dedication requirement was *not* state dominated. That is, *the jury obviously considered the city's dedication requirement in arriving at its verdict.* * * * " Respondent's Brief, No. A66578, at 12 (emphasis added).

Having conceded this point below, the state should not be permitted to take a contrary position now.

The constitutional issues presented here should be too important to be dismissed by such self-serving "explanations" of what the jury was thinking. The state's inability to face these issues directly demonstrates the appropriateness of review. Indeed, while the state argues the need for a "fact-bound, case specific examination of

the particular trial record," the salient facts are quite straightforward and support a summary reversal.

The petition should be granted.

Respectfully submitted,

CHARLES F. HUDSON*
ROBERT E. MALONEY, JR.
LANE POWELL SPEARS LUBERSKY
Suite 800
520 S.W. Yamhill Street
Portland, Oregon 97204
(503) 226-6151

GEORGE W. MEAD, JR.
1480 Pacific First Federal Building
851 S.W. Sixth Avenue
Portland, Oregon 97204
(503) 228-7686

*Counsel of Record

Counsel for Petitioner